UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

FREEMAN DECORATING CO. Employer and OKRA, LOCAL UNION 4U Petitioner	Case 18-RC-17359

DECISION AND DIRECTION OF ELECTION

Petitioner seeks an election in a unit of all full-time and regular part-time employees employed by the Employer in the greater Minneapolis/St. Paul metropolitan area, excluding office clerical employees, the sales employee, guards and supervisors as defined in the National Labor Relations Act, as amended. On the other hand, the Employer contends that it is unclear whether Petitioner is a labor organization within the meaning of Section 2(5) of the Act; that the unit sought by Petitioner is inappropriate because the Employer only employs casual employees in the Minneapolis/St. Paul area, and because those employees work intermittently and sporadically they may not constitute a unit appropriate for collective bargaining; and finally, that to the extent casual employees may constitute a unit, there is no identifiable group of employees that has a reasonable expectation of employment with the Employer due to changes in the Employer's operation.

After reviewing the record, I conclude that Petitioner is a labor organization within the meaning of Section 2(5) of the Act. I further conclude that while the evidence is clear that the

Employer only employs casual employees in the Minneapolis/St. Paul area (except for one sales employee), that those casual employees constitute a unit appropriate for collective bargaining. Finally, contrary to the Employer, I conclude that the evidence in the record is insufficient to establish that there are fundamental changes in the Employer's operation that suggest there is no identifiable group of employees with a reasonable expectation of employment. Therefore, I will order an election in a unit consisting of casual employees employed by the Employer in the greater Minneapolis/St. Paul area, as described below.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. The Employer refused to stipulate that Petitioner is a labor organization. The record evidence regarding this issue is not disputed.

Petitioner was formed on March 27, 2005. It was formed by some of the employees who were members of a bargaining unit consisting of casual employees employed by the Employer, and who were represented by United Steelworkers of America, AFL-CIO-CLC, Drapery, Slip Cover, Window Shade, Venetian Blinds, Exhibition, Flag and Bunting Decorators Union, Local No. 17U Minneapolis Unit. This group of employees formed Petitioner upon Local 17U's

[1] The Employer, Freeman Decorating Co., is an Iowa corporation with an office and place of business in Des Moines, Iowa, where it engages in the manufacture, rental, and installation of exhibits, decorations, booths and equipment for conventions and trade shows. During the calendar year ending December 31, 2004, a representative period, the Employer grossed revenues in excess of $500,000. During that same time period, the Employer sold goods and services valued in excess of $50,000 directly to customers located outside the State of Iowa.

disclaimer of interest in representing the casual employees employed by the Employer. Local 17U's disclaimer occurred on March 22, 2005.

Petitioner has no office location, and its address is a post office box in Minneapolis. Petitioner also does not have a fax, email address, bylaws or constitution, incorporation documents, or permanent officers. Its telephone number is the personal cell phone number of one of the employees involved in creating Petitioner. Petitioner's temporary director is Annette Richter. Petitioner has not filed any forms with any government agency. It is not affiliated with any other group.

To date Petioner has held one meeting, which was on March 27, 2005. According to the minutes of that meeting (which is in evidence), five employees met to "form a committee/labor organization now agreed to be call OKRA local union 4u (sic) for the purpose of collective bargaining with Freeman Decorating Co. for employees in the decorating unit in greater metro Minneapolis-St. Paul. We agreed to form a bargaining committee to negotiate with Freeman over such issues as wages, employment, work conditions, grievances and labor disputes. We agreed to meet as a committee as necessary and agreed to meet on the day of the election returns…Dan agreed to file the petition for representation while Louie and Annette agreed to collect authorization cards."[2]

Also in evidence is a copy of the authorization card signed by individuals. It states: "I hereby authorize OKRA local union 4u To represent me in collective bargaining" (sic).

Petitioner's name has no significance – that is it is not an acronym. Currently, Petitioner

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[2] In its post-hearing brief, the Employer suggests that this and other evidence provided by Petitioner is suspicious, and therefore, apparently that Petitioner's claims to be a labor organization are incredible. Apart from the fact that the Employer's suggestions are speculative, there is simply no record evidence contradicting the testimony or documents regarding Petitioner's creation or purpose.

does not collect dues or have formal membership requirements. Currently, Petitioner's view is that all employees in the unit previously represented by Local 17U and employed as casual employees by the Employer, constitute the individuals who could become members of Petitioner.

Board law is clear and long-standing that in order to be a labor organization under Section 2(5) of the Act, two things are required. First, the organization must be one in which employees participate. Second, the organization must exist for the purpose of dealing with employers regarding wages, hours, and other terms and conditions of employment. *Alto Plastics Mfg. Corp*, 136 NLRB 850, 851 (1962). The facts that the organization lacks formal structure, including bylaws and a constitution, does not collect dues, or that the purposes of it have not yet come to fruition, do not result in a finding that the organization fails to meet the requirements of Section 2(5) of the Act. *Michigan Bell Telephone Co.* 182 NLRB 632 (1970); *Butler Mfg. Co.* 167 LRB 308 (1967). To the extent an organization has an obligation to file with government agencies, the failure to do so also does not result in a finding that the organization fails to meet the requirements of Section 2(5) of the Act. *Harlem River Consumers Cooperative*, 191 NLRB 314 (1971).

Because I conclude that the record is clear that employees participated in the formation and business of Petitioner, and that Petitioner exists for the purpose of dealing with at least one employer concerning wages and working conditions, I am also compelled to conclude that Petitioner is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. None of the facts in this matter is in dispute. I will first summarize the evidence regarding the Employer's operation and historical relationship with Steelworkers Local 17U. The second section of this decision will present the Employer's arguments and facts supporting those arguments. I will then analyze extant Board law that is relevant to the Employer's arguments. Finally, I will explain my conclusion that an election should be held among the Employer's casual employees employed in the greater Minneapolis/St. Paul metropolitan area.

THE EMPLOYER'S OPERATION

The part of the Employer's operation relevant in this case is hired by trade associations or show management firms to produce events. Generally these events occur in convention centers or convention hotels. The Employer takes an empty hall, and turns it into a trade exhibit show. This includes unloading material used for the hall, decorating with carpet, furnishings, and pipes and drapes, graphic installation, and providing the labor to unload, install and dismantle exhibits. The Employer might also provide unspecified services during the event, but these are more limited than the set up and dismantling functions.

The Employer has been in business for 78 years, and for the last 20 of those years it has done business in the Minneapolis, Minnesota area. The Employer's headquarters is in Dallas, Texas. It has 26 branches, each assigned a geographical area. There is not a branch office located in Minneapolis. Rather, the nearest branch office is in Des Moines, Iowa. The Des Moines and Chicago, Illinois offices handle any shows in Minneapolis.

Minneapolis represents only four-tenths of 1% of the Employer's national volume. In the year 2003 the Employer handled 16 shows in Minnesota. In the year 2004 the Employer handled

13 shows in Minnesota. To date, in 2005, the Employer has handled 4 shows, with an additional 8-9 shows scheduled to be handled, in Minnesota.

Until recently the Employer has never had any permanent employees employed anywhere in Minnesota. Recently the Employer hired a salesperson assigned to one customer – 3M. It appears that salesperson will handle shows for that customer throughout the nation. Otherwise, the Employer currently has no permanent employees in Minnesota.

Until March of this year, and for about the last ten years, the Employer had a collective bargaining relationship with Local 17U, and it was the Employer's source of casual labor. That is, the most recent and past contracts between the Employer and Local 17U included a referral system. The Employer called or faxed a request for a certain number of employees for specified dates, and Local 17U provided the labor needed. If Local 17U could not provide the needed labor, the Employer had the right under the contract to obtain labor from other sources. It is clear from the record that the Employer viewed these employees as casuals – employed only as needed by the Employer. Included in evidence are Employer records showing the names of all employees in the Local 17U unit who worked for the Employer in the year 2004 and in the first quarter of 2005. Also listed are the total hours worked by each of the named employees, broken down on a quarterly basis. This evidence reveals that in the year 2004, individuals worked as little as six hours during a one week period to as much as 616.25 hours that were worked in a total of 15 different weeks.

The casual employees that the Employer obtained through Local 17U's referral system have not been the only employees employed by the Employer while working in the Minneapolis/St. Paul area. Rather, the contract with Local 17U reserved to the Employer the right to utilize other labor sources, and in the past, the Employer sometimes subcontracted the

decorating work, and sometimes brought its own permanent employees from Des Moines or Chicago to perform either all or part of the work. Factors considered in selecting which source of labor to use include both the size of the event and the event's complexity as some events might require employees with more skills.

The casual employees utilized by the Employer in shows in the Minneapolis/St. Paul area unload and install equipment and remove the equipment at the end of the event. None of the casuals have titles, nor is there a delineation based on skills, although the contract with Local 17U provided a higher hourly wage for employees with more hours of work.

THE EMPLOYER'S CONTENTIONS

The Employer contends that the unit sought by Petitioner is inappropriate because the Employer does not employ full or regular part-time employees in Minnesota. Instead, according to the Employer, it employs casuals who work intermittently and sporadically, and a unit composed of only casual employees is not appropriate.

The record supports the Employer's position that it does not employ full or regular-part time employees in Minnesota, except for a salesperson that the parties agree should be excluded from any unit found appropriate. Thus, as maintained by the Employer, it employs employees who work sporadically and intermittently in the State of Minnesota.

The Employer also contends that with regard to the casuals employed prior to the disclaimer of interest by Local 17U, that they have no reasonable expectaction of employment. The basis for the Employer's contention is that those casuals were referrals by Local 17U as a result of a contract that no longer exists, and therefore, the Employer is no longer required to use those casuals.

The record is clear that the contract with Local 17U is no longer in force, and therefore, that the Employer is no longer contractually required to use the casuals previously referred by Local 17U. However, the record is less clear what the Employer intends to use in lieu of the casuals previously referred by Local 17U. According to the Employer, it may subcontract all or parts of the work, it may utilize its permanent employees located in Chicago and Des Moines, or it may reach out to the local casuals that it has worked with in the past. According to the Employer, it could also use a temporary employment agency to hire day laborers. As a result, the Employer cannot predict how many casual employees employed prior to Local 17U's disclaimer will be utilized for the remainder of 2005.[3]

BOARD LAW

I know of no Board cases supporting the Employer's contention that a unit of employees who work intermittently or sporadically is inappropriate for collective bargaining.[4] On the contrary, the Board has approved units of employees who work an irregular pattern of employment in the construction industry. *Steiny & Co.*, 308 NLRB 1323 (1992). In fact, in *Steiny & Co.* the Board identifies a number of situations in a number of industries where the Board has approved election and used eligibility formulae to address short-term, sporadic, and intermittent employment. 308 NLRB at 1325. Rather, as the cases make clear, the issue instead

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[3] Since Local 17U's disclaimer of interest, the Employer has not had work in the Minneapolis/St. Paul area. The Employer does have a show at the end of April, but because it is a small show the Employer intends to utilize its permanent employees from Des Moines and/or Chicago.

[4] In its post-hearing brief, the Employer cites three cases that allegedly support the proposition that a unit composed of only casual employees is inappropriate. However, none of the three support such a finding. Two of the cases (*San Francisco Art Institute*, 226 NLRB 1251 (1976) and *Saga Food Service of California, Inc.*, 212 NLRB 786 (1974)) involve the question of whether students should be included in units, and the third (*G.C. Murphy Co.*, 128 NLRB 908 (1960)) involves inclusion of extra employees in a traditional unit of permanent employees.

is to properly identify those employees who should be eligible to vote in industries where the pattern of employment does not reflect a prevalence of employees working regular workweeks for extended uninterrupted periods of time with the same employer.

However, also to be considered in cases where an employer's work force fluctuates greatly, and where the employer operates on a project-by-project basis, is whether a petition should be dismissed because the unit sought is not substantial and representative of the complement of employees to be employed in the reasonably foreseeable future. *MJM Studios* 336 NLRB 1255 (2001). [5] The principle factor to examine is whether there are "fundamental changes" in an employer's operation warranting dismissal of the petition. *Id* at 1256.

CONCLUSION

With regard to the Employer's contention that a unit of casual employees is an inappropriate unit, as already noted, I am not aware of any Board cases supporting that contention. Moreover, on the contrary, as set forth above, the Board has approved units consisting solely of employees employed intermittently and sporadically. I also note that the Employer and Local 17U enjoyed a collective bargaining relationship of nearly ten years, where the unit consisted of casual employees. This fact is made clear by the last contract between Local 17U and the Employer, as well as by the Board in *Freeman Decorating Co.*, 335 NLRB 103 (2001), enfd. 315 F.3d 906, 171 LRRM 2656 (8th Cir. 2003). Thus, Petitioner's unit is consistent with the historical unit between the Employer and Local 17U.

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[5] This is essentially the Employer's alternative position in the instant case. It maintains that because it is no longer contractually obligated to utilize Local 17U's hiring hall procedure, that therefore, the employees utilized in the past as a result of that procedure have no reasonable expectation of future employment, and therefore, do not constitute a substantial and representative complement of employees to be employed in the reasonably foreseeable future.

I further conclude that the record evidence does not indicate that there are fundamental changes in the Employer's operation that warrant a conclusion that the work force employed by the Employer prior to Local 17U's disclaimer of interest has no reasonable expectation of future employment.

The record is clear that the Employer intends to continue to do business in the Minneapolis/St. Paul area, that the Employer has several projects scheduled for this year, and that in fact, the number of total projects scheduled for 2005 is comparable to the total projects performed in the years 2003 and 2004. Moreover, there is no record evidence that the Employer intends to eliminate aspects of its business or shift to a different type of business. On the contrary, the Employer's evidence is clear that it intends to perform the exact same work with the exact same sources of labor. That is, as the Employer has always done, it will use a mix of subcontractors, its own permanent employees located in Chicago and Des Moines, and casual employees provided from either its own list of names of casuals used in the past or possibly from temporary employment agencies. The only differences articulated by the Employer at the hearing are that it is no longer contractually obligated to utilize a union hiring hall, and therefore, it will maintain its own list of casual employees, and that the Employer may choose to use temporary employment agencies as an additional source of casual labor.

In *Wilson & Dean Construction Co.*, 295 NLRB 484 (1989), the Board rejected a defense that is very similar to the Employer's position in this case. The employer in the *Wilson* case was engaged in commercial and industrial construction. Prior to termination of the collective bargaining relationship, the employer had obtained employees it needed from a union hiring hall. After termination of the relationship, the employer adopted a new hiring procedure and decided to hire its employees from a roster it compiled. The roster consisted of the names of all former

employees and employees who had not previously worked for the employer but had applied in response to employer advertisements. The employer in *Wilson* argued that because it no longer intended to use the hiring hall as required by the prior contract, therefore, the employees hired through the hiring hall have no reasonable expectancy of future employment. The Board rejected the employer's defense. It held that there was no record evidence that the employer's criteria precluded the hiring of former employees.

In the instant case the Employer's testimony in support of the defense is even less compelling than the evidence provided by the employer in *Wilson*. The instant Employer has made no effort to plan a different method of hiring than it utilized prior to Local 17U's disclaimer, and in fact the Employer acknowledges it could use the same group of casuals as provided by Local 17U. The Employer merely maintains that in addition, it could subcontract work or use its permanent employees from Des Moines and Chicago, both of which the Employer utilized even when contractually obligated to utilize Local 17U's hiring hall for casual labor. Thus, the only significant difference is the Employer testimony that it might use temporary employment agencies. I conclude that testimony is speculative, and the Employer has no concrete plans to do so. Even assuming such plans existed, as in *Wilson*, those plans do not preclude the hiring of former employees.

Therefore, I conclude that employees referred by Local 17U prior to that union's disclaimer of interest have a reasonable expectation of future employment with the Employer, and therefore, that an immediate election is warranted.

6. While the parties did not discuss an eligibility formula to determine who should be allowed to vote at the hearing, in its post-hearing brief the Employer contends that various formulas used by the Board in cases involving mixed units of permanent and causal employees

would not work in the instant case. For example, according to the Employer, application of the eligibility formulas set out in *Daniel Ornamental Iron Co.,* 195 NLRB 334 (1972) or *Davison Paxon Co.,* 185 NLRB 21 (1970), would yield no eligible voters. I agree with the Employer that the formulas set forth in these cases are not applicable, but primarily for the reason that in both cases the employers operate continuosly and therefore, the formulas work best with employers which have a core group of employees, and sometimes use casual employees. In view of this, and after reviewing of the hours worked by casual employees employed by the Employer in 2004 and the first quarter of 2005, it appears that the most useful formula would be the standard set out in *Julliard School*, 208 NLRB at 155. Like the instant case, in *Julliard School* the employer did not consistently employ a nucleas of "per diem" (casual) employees. Also like the instant case (as set forth above), in *Julliard School* the employer nevertheless employed many of the casual employees for periods of time which indicated repetitive employment and which permitted the employees to reasonably anticipate reemployment in the near future. Finally, I note the formula set out in *Julliard School* is identical to the unit certified by the Board in 1995 (pursuant to a stipulated election agreement and not a directed election). *Freeman Decorating Co.*, 335 NLRB at 106-107. Therefore, the *Julliard School* formula appears the most appropriate in view of the nature of the Employer's operation.

Thus, eligible to vote will be all employees who have been employed by the Employer during two trade shows for a total of 5 working days over a 1-year period, or who have been employed by the Employer for at least 15 days over a 2-year period.

7. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees engaged in providing labor for the Employer at trade shows or exhibitions held in the greater metropolitan area of Minneapolis/St. Paul, Minnesota; excluding employees employed by the Employer at its Chicago and Des Moines branch offices, the salesperson, guards and supervisors as defined in the National Labor Relations Act, as amended.

DIRECTION OF ELECTION[6]

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the

[6] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **May 16, 2005**.

election date and who have been permanently replaced.[7]

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **OKRA, Local Union 4U**.

Signed at Minneapolis, Minnesota, this 2nd day of May 2005.

/s/ Ronald M. Sharp

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[7] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, Towle Building, 330 South Second Avenue, Minneapolis, MN 55401-2221, on or before close of business **May 9, 2005**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.